
(1983) 12 DEL CK 0008

In the Delhi High Court

Case No : Civil Writ Petition No"s. 211 of 1977 and 162 of 1981

A.S. Tiwari

APPELLANT

Vs

Delhi Administration, etc.

RESPONDENT

Date of Decision : 06-12-1983

Acts Referred:

Citation : (1984) 25 DLT 477 : (1984) 2 ILR Delhi 607 : (1984) 2 SLJ 33

Hon'ble Judges : A.B. Rohtagi, J

Bench : Single Bench

Advocate : G.D. Gupta, Maehswar Dayal and O.P. Tyagi, for the Appellant;

Judgement

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Avadh Behari Rohatgi, J.

(1) This is a tale of two teachers. They are physical instructors in a school. They are drill masters of the good old days. But better qualified and better paid now. Physical education has acquired a new importance in our modern system of education. The State has realised that children should be strong and healthy. "A sound mind in a sound body" is the maxim that is followed now. The facts :

(2) These two writ petitions are filed by two physical education teachers who are working in Birla Higher Secondary School now known as Birla Senior Secondary School in old Sabzi Mandi, Delhi. This is a Government recognised and aided school. A. S. Tiwari, petitioner in C.W.P. No. 211 of 1977, joined the school on 15-7-51. Om Prakash Verma, petitioner in C.W.P. No. 162 of 1981. joined the school on 15-7-1953. Though Tiwari was appointed earlier the qualifications of these two teachers are different. Tiwari at the time of appointed was a matriculate holding a certificate in physical education. In 1974 he passed the intermediate examination. So far as Verma is concerned he was an intermediate holding a certificate in physical education at the time of his appointment. His qualification however has remained the same.

(3) Both were appointed as junior physical education teachers in the school in the scale of Rs. 68-4-120-EB-7-170. Verma, it appears, was dissatisfied with his lot. He requested the education department of Delhi Administration to give him the pay scale admissible to intermediate with certificates in physical education. He claimed the revised pay scale of Rs. 110-5- 150-8-190-EB-10-250. By letter dated 15-9-1975 Verma's request was allowed by the Director of Education. He was informed that from the date of his appointment, i.e. 15-7-1953, his pay is fixed in the scale of 100-250 but the payment of arrears shall be restricted to three years.

(4) When Verma got this revised pay scale of Rs. 100-250 rivalry between Verma and Tiwari began. Tiwari's pride was wounded. He had nothing for Verma except animosity and pique. Verma started getting the revised pay scale of Rs. 100-250. Tiwari continued in the old scale of Rs. 68-170. Subsequently, it was raised to Rs. 80-220. So the real problem is this. Verma, though he joined the school later was getting pay in the higher scale of Rs. 100-250. Tiwari, though he was in employment from an earlier date, was merely getting the pay scale of Rs. 80-220. A winner of discontent :

(5) On Verma's getting the higher grade Tiwari was cut to the quick. He complained to the education department. The education officer started moving in the matter. On 15-12-1977 he issued a memorandum to Verma asking him to show cause why the letter dated 15-9-1975 granting him the higher grade of Rs. 100-250 should not be cancelled. It was said that he had been given the higher grade "erroneously". The principal ground for rescinding the decision of 15-9-1975 suggested in this letter was that the Government of India, Ministry of Education circular letter dated 17-1-1950 and amended by circular letter dated 17-6-1954 applied "only to those Inter Certificated P.E.Ts. who were in service on 1-4-1950. Since Shri Verma Was appointed on 15-7-1953, the said circular from the Government of India, Ministry of Education, New Delhi, evidently does not apply to him."

(6) Now Verma was put on the defensive. He was asked to show cause why the higher grade be not taken away from him and why he should not be down-graded to the scale of Rs. 80-220 and placed in the same position as Tiwari. To this memorandum Verma sent a reply. His simple case was that he was an intermediate with certificate in physical education and Therefore entitled to the higher grade.

(7) On 27-1-1978 the education officer cancelled the order dated 15-9-1975 with the remark that Verma's "explanation is not satisfactory". So the result was that Verma came back to square No. 1. The grant of higher pay scale of Rs. 100-250 given to him on 15-9-1975 was rescinded on 27-1-1978. He enjoyed this higher pay scale for less than three years. After it was cancelled he was asked to pay back all that he got under the order dated 15-9-1975. This was a devastating blow to Verma. It was now his turn to assail the decision of the education officer.

(8) On the cancellation of the order granting higher pay scale to Verma obviously Tiwari clapped in joy. He rubbed his hands with glee. Venna was humbled. He became the butt end of ridicule in the eyes of his fellow teachers. So on 20-1-81 he brought this writ petition in the winter of his discontent. He has questioned the validity of the cancellation order dated 27-1-1978.

(9) The single question in these two writ petitions is : Whether Verma and Tiwari are entitled to the higher grade of Rs. 100-250 ? Both of them claim this higher grade. To both it has been denied. Both have come to this court. History : Two Circulars of 1950 and 1954.

(10) To understand the history of pay scales of physical instructors it is necessary to go back to 1950. On 17-1-1950 the Governor-General introduced revised scales of pay in Delhi and Ajmer-Marwari The revised scales are given in the enclosure to the letter of 17-1-1950 which are as under :

Proposed	Scale	Minimum	Remarks	No.	Sl. Post Qualification
Training 120-8-EB-10-300	Graduate with Future Minimum	Instructors Diploma in			4. Physical
from 1.4.1950. Physical Training.	100-5-150-EB-8-	Intermediate Temporary			
190-10-250. with certificate relaxation for in Physical existing Training,	3employees. 80-5-120-EB-8-	metric with 200-10/2-220. Certificate in Physical			
Training.	68-4-120-EB-5-170	Any			recognized

(11) As would appear from the above enclosure, for the first time the minimum qualification for a physical training instructor was prescribed. It was" laid down that he must be a graduate with diploma in physical training. His pay scale was fixed at Rs. 120-8-EB-10-300. This was the minimum qualification for the physical training instructors who were to be employed in future from 1-4-1950. The "existing employees" were either intermediates or matriculates with certificates in physical training or they were persons having other recognised qualifications. For these "existing employees" the grades were revised. The intermediates were to get Rs. 100-250. The matriculates were to get Rs. 80-220. Those who did not possess any academic qualification and had only a certificate in physical training or any other recognised qualification were to be paid Rs. 68-170. The entire controversy in this case centres round this enclosure.

(12) The case of the Director of Education is that "temporary relaxation for existing employees means" that the grades prescribed were personal to those who were in service on 1-4-1950." Those who came afterwards and joined the service in 1951, as is the case with Tiwari, or in 1953, as with Verma, they were not entitled to the revised scales of pay introduced by the Governor-General. It is said that it was open to the Director of Education or the schools for that matter to employ a physical training instructor in 1951 or 1953 on the pay scale of Rs. 68-170 regardless of the fact whether he is a matriculate or an intermediate. They could hire him at such pay as they liked. A great deal of emphasis is laid on

the words "temporary relaxation for existing employees." On behalf of the department it is argued that neither Tiwari nor Verma is entitled to the benefit of the revised pay scales introduced for the first time by the Governor-General in 1950. Tiwari and Verma dispute this stand of the department.

(13) Subsequent to the letter of 17-1-1950 another letter was issued on 17-6-1954. This was issued by the President of India. This letter amends the schedule which I have reproduced above. The amendments to the scheme are the following : "Amendments to the Schedule Pay Scales Minimum qualifications remarks as Amended 1. Higher Secondary Schools : Physical Training (i) 120-8-200-EB-10-300 Graduate with Diploma in PT. (ii) 10C-5-150-8- Inter with Certificate in P.T. 190 EB-10-250. (iii) 80-5-120-EB- metric with Certificate in P.T. 8-200-10/2-220 (iv) 68-4-120-EB- Any recognised P.T. qualification 5-170 614 2. High Schools : Physical Training (the same as prescribe above for Higher Secondary Schools). C.W.P. 211/87 & 168/81. Middle Schools : Physical Training (i) 80-5-120-EB-8- metric with Certificate. 200-10-/2-220. (ii) 68-4-120-EB-5- Any recognised P.T. qualifications. 70.

I am further to say that the revision of scales of pay as detailed above will take effect from the date of issue of these orders. sd/- Dhani Ram Under Secretary."

(14) This letter Of 17-6-1954 led to an acute controversy. It has been differently interpreted at different times as the subsequent circulars of Delhi Administration show. The case of Verma is that by amendment the President has introduced the same pay scales as were adumbrated in the letter of 17-1-1950 with this difference that what was limited to "existing employees" became available to one and all. Whether they were in employment on 17-1-1950 or at any time thereafter. "I am further to say that the revision of scales of pay, as detailed above, will take effect from the date of issue of these orders." This sentence appearing at the end of the letter dated 17-6-1954 shows that the President did not make any distinction between the "existing employees" and subsequent entrants. He treated them all alike. Government of India's letter of 1961.

(15) On 31-1-1961 the Ministry of Education in the Government of India issued a letter on the subject of regularisation of appointment of physical training instructors. By this letter the President conveyed ex post facto sanction to the regularisation of the creation by the Delhi Administration of the posts of physical training instruction in High and Higher Secondary Schools during the period 1-4-50 to 31-12-59 in the scales of Rs. 100-250, 80-220 and 68-170 which had been sanctioned by the Governor-General on 17-1-1950 as "personal to those who were in service cm 1-4-50 and did not possess the prescribed qualifications." It was further stated that the Government of India has approved "the regularisation of the appointment of physical training instructors, to those posts, provided they fulfill the educational qualifications indicated against these scales in this Ministry's Letter No. F-2-10/49-D.-4 dated 17-1-1950 as subsequently modified by this Ministry's letter No. F. 6-32/54- B-3 dated 17-6-1954."

(16) This letter, in my opinion, is decisive on the question before me. It means this that if an instructor possesses the educational qualifications indicated against the scales of pay in the letter of 1950 and 1954 he will be entitled to that pay scale. This was the avowed policy of the Ministry of Education with respect to the appointment of physical training instructors. What was "personal to those who were in service" on 1-4-50 became the regular method of recruitment of physical training instructors. Two things were done : (1) the educational qualifications were prescribed, (2) the pay scales were laid down. The educational qualifications entitled the man to get the pay scales prescribed in the amendment to the letter of 17-6-1954. In other words, the condition of pay scales being personal to those who were in service on 1-4-50 was abolished. All the schools were asked to employ teachers and pay them according to their educational qualifications.

(17) Many physical instructors had been employed during the period from 1-4-50 to 31-12-1959 in the three scales of Rs. 100-250, Rs. 80-220 and Rs. 68-170. The President ex post facto sanctioned and regularised all these appointments. Nothing remained "personal to the existing employees", as was the case in 1950.

(18) The scheme of 1950 lasted nearly 10 years. From 1-4-1950 to 31-12-1959 it continued. The letter of 31-1-61 regularised all those appointments which had been made during the period. Only one thing had to be seen. The man must possess the prescribed qualifications. If that is so, he must be paid the revised pay scales fixed by the Governor-General in 1950. This is how I read this letter. Director's Letter of 4-9-71

(19) This was clarified by the letter of the Director of Education dated 4-9-1971 which says : "Directorate of Education R & S Branch No. F.DE/R&S/PET/71 Dated the 4 September, 1971. The Principals, Govt. Boys and Girls Higher Section School, Delhi/New Delhi. Subject: Revision of scales of pay of teachers etc. of Education Department and regularisation of appointments of PTIs. Sir/Madam,

I am directed to.....say that all the PTIs with minimum qualifications of Inter with Certificate of Physical Education and working in the Govt. High/Higher Secondary Schools should be paid the Grade of Rs. 100 250 from 1-5-1950 to 31-12- 1959".

Verma rests his case on this letter. He is a physical training instructor with the minimum qualification of intermediate. He has got a certificate in physical education. He was working in an aided Higher Secondary School which is on the same level as the Government Higher Secondary Schools for purposes of pay scales. He must be paid the grade of Rs. 100 250 because he came in employment during this period from 1950 to 1959. Revised Pay Order, 1960 : A closing decade :

(20) There is an important reason for this decision which covered all physical training instructors during the period of 1950 1959. The reason is that on 9-12-1960 a "Revised Pay Order 1960" was issued which introduced different

pay scales for the future. By the Revised Pay Order, 1960, the physical training instructors were divided into two grades grade I and grade II. Their pay was fixed as follows : S. No. Name of the post pay Revised. of the original letter 23. Physical Training 120-8-200-EB 170-10-290- instructor Grade I for 10-300, EB-15-380. Class IX & X. 24. Physical Training 80-5-120-EB- 130-5-160-8-Instructor Grade II for 8-200-10/2-220. 200-EB 8-256 class VI to VIII. EB-8-280-10-300

(21) We have seen that previously there were four scales of pay. They were abolished by one stroke of pen. Two grades were introduced for the sake of uniformity. There is no doubt that if a physical training instructor was an intermediate having a certificate in physical training and was in service at any time during the period of 1950-59 he was governed by the pay scales of 1950 modified by the letter of 1954. This is the sum and substance of the various circulars on this subject which I have quoted above.

(22) The letter dated 17-11-56 issued by the Directorate of Education leaves me in no doubt that the qualifications of a teacher entitled him to the pay scale prescribed against his qualifications. It did not matter whether he was an "existing employee" in 1950 or was subsequently taken in employment at any time during 1950 to 1959. The letter of 17-11-56 says:

"keeping in view the qualifications possessed by a teacher the post shall be deemed to carry the scale of pay which a particular teacher is entitled to in accordance with these qualifications".

(23) This means this. If he is a matriculate he will get Rs. 68 170. If he is an intermediate he will get Rs. 80 220. If he is a graduate he will get Rs. 120 300. In each case he must have a professional qualification. A diploma if he is a graduate. A certificate in physical training if he is an intermediate or a matriculate. The aim of the Governor-General and the President was to ameliorate the conditions of the teachers. The physical instructors had been poorly paid for many years. Little importance was attached to physical education. When its importance was realised in independent India the Government did everything to better their service conditions. The letters of 1950 and 1954 were steps in this direction. Though the idea was to employ graduates with diplomas in physical training as envisaged in 1950 by the Governor-General it remained largely a dream. Graduates with diplomas were not available. Schools were therefore employing intermediates and matriculates. This is why the case of intermediates is specifically referred to in the letter of 4-9-1971. "All the PTIs with minimum qualification of Inter with certificates in physical education" "should be paid the grade of Rs. 100 250 from 1-5-1950 to 31-12-1959".

(24) In my opinion the position is crystal clear. Verma is an intermediate. He has a certificate. He was employed during the period 1950 to 1959. The department must pay him the grade of Rs. 100 250. They did give him this grade on 15-9-1975. That was the right thing to do. The Director of Education himself

allowed the request of Verma. Later on what prompted the department to cancel this Order is not quite clear.

(25) Only one Explanation has been offered in the counter affidavit. That Explanation is that the circular of the Governor- General of 1950 was applicable only to those who were in service on 1-4-1950 and none else. This is a wrong reading of the circulars of the Governor-General and the President. The department cannot take one decision in 1975 and another decision in 1978 on the same circulars. This will introduce confusion and uncertainty. No one will be sure of his service and his emoluments.

(26) "THE only reason given for cancelling the order of 15-9-1975 is that it was given to Verma "erroneously". Was it given under a misconception of the true legal position ? I do not think that was the case. The office noting shows that the question of cancellation was taken up only when Tiwari made a complaint to the department. At that time it was felt that Verma will have an edge over Tiwari if he is given the grade of Rs. 100 250. So the department issued a memorandum, to Verma asking him to explain why the order made in his favor dated 15-9-1975 should not be cancelled. This was a strange way of doing things. The department had knowingly given him this higher grade. The department now owed to Verma to explain why they were minded to cancel their own order of 15-9-1975. Instead of doing this, Verma was asked to explain. This, in my opinion, is a perversion of the principles of natural justice. It is putting natural justice upside down. The education officer turned everything topsy-turvy . The department has to explain why one decision was made in 1975. Why was it necessary to unmake it in 1978 ? On whose advice was cancellation done ? If it was on some advice, was. that legal advice and who was the author of it ?

(27) On a fair reading of the circulars it appears to me that the object of the President was to introduce uniformity so that in case of public employment there is no distinction between one teacher and another provided he possesses the same qualifications. Nothing is personal to anyone. Ultimately it was thought that everyone should be treated alike whether he entered the service in 1950 or at any time between 1950 and 1959. That is a period in the history of education which was treated separately and distinctly , because after December 1959 new scales of pay were introduced in Delhi. The letter killeth:

(28) Centuries ago St. Paul said : "The letter killeth, the spirit gives life". The spirit of the circulars is that all teachers are to be treated alike if they possess same qualifications. The cold, narrow and soulless approach will defeat not only justice but also the intention of the promulgator. Administrative Law : Protect the individual

(29) Government departments are public authorities. They exercise a public function. It is their public duty to act fairly and reasonably. The purpose of public law remedies is to ensure that the individual is given fair treatment by the authority to, which he has been subjected. The public law remedies are designed

to protect the individual against the abuse of power by a wide range of authorities, judicial, quasi-judicial and administrative. The function of the courts is to see that lawful authority is not abused by unfair treatment. [See *Chief Constable v. Evans* (1982) 1 Wlr 1155 (1), 1160 per Lord Hailsham]. The action of the education officer must be condemned on the simple ground that it was, in the words of Lord Hailsham, "unfair treatment". The courts can and will intervene in defense of the ordinary citizen.

(30) The education department inflicted an injustice on Verma when they took away the higher grade from him. To Verma the education officer simply said : "Your Explanation is unsatisfactory. I cancel the order giving you higher grade". This is not right. The courts will intervene to prevent abuse or misuse of power by any public authority or public officer or other person acting in the exercise of a public duty. The remedy of writs was invented by the courts "to cover many more misdoings by public authorities", as Lord Denning has said. This is judicial control of administrative acts and omissions. The Duty to decide according to law:

(31) Lord Diplock has said:

"It is not, in my view, if sufficient answer to say that judicial review of the actions of officers or departments of the Central Government is unnecessary because they are accountable to Parliament for the way in which they carry out their functions. They are accountable to Parliament for what they do so far as regards efficiency and policy, and of that Parliament is the only judge; they are responsible to a court of justice for the lawfulness of what they do, and of that the court is the only judge". (*Inland Revenue Commissioners v. National Federation of Self-Employed and Small Business Ltd.* (1982) Ac 617 (2).

The concern of the courts is to protect the individual from the misuse or abuse of power by those in authority. Prof. Wade in his *Administrative Law* (5th ed.) p. 38 says:

"The simple proposition that a public authority may not act outside, its powers (*ultra virus*) might fitly be called the central principle of administrative law".

In public law the central principle is that a public authority in the exercise of the powers conferred on it will act in accordance with the law. If it goes wrong in point of law it goes outside its powers.

"Departmental aggression"

(32) In my opinion, the Director of Education acted outside his powers in cancelling his own order of 1975. Farwell LJ in *Dyson v. A.G.* (1911) 1 K.B. 410 (3), 424, said:

"The courts are the only defense of the liberty of the subject against departmental aggression".

I think the unfair treatment meted out to Verma is an example of "departmental aggression".

Freedom and Consent:

(33) The main argument of counsel for the Administration was that Verma was employed in the pay scale of Rs. 68 170 and the employer, whether it is the Government or the aided school, has a right to hire at such pay as it deems proper. Verma consented to accept the employment in the pay scale of Rs. 68 170, it is said. I cannot accept this. Some things are very important. Freedom, for example. It is actually inalienable. What that affective adjective means is this that if you agree for pay not to claim your freedom, you still may. Freely. You may not sell yourself into slavery. Or in bonded labour. If you do, you are entitled to liberate yourself. Of course it is commoner to agree to be a servant than to be a slave. Being employed, also limits your freedom, though it gives you bread. If a man agrees not to claim the pay scales fixed by the Government it will be servitude. Because of the unequal bargaining strength. Such a promise will be void.

(34) Mr. Gupta on behalf of Tiwari has taken the same stand as the Director of Education. He has referred me to several circulars in support of his contention that the pay scales introduced in 1950 by the Governor-General remained throughout "personal to the existing employees". Those who entered service after 1-4-1950, according to him, are not entitled to the grade of Rs. 100 250 even if they are intermediates with certificates in physical training. This means that Verma for ever must be condemned to the scale of Rs. 80 220 even though he is better qualified. His fate will remain sealed.

(35) The truth is that the Education Officer did not comprehend the true legal position and cancelled the decision of 1975 by a single stroke of pen in 1978 without assigning any good reason for the cancellation. He was under a complete misconception. He was bound to honour the decision of 1975. It was taken in terms of the President's circular. The education officer did not realise the importance of the amendment. The words "relaxation in favor of the existing employees" are not to be found in the letter of 1954. They appeared in 1950 letter. They disappeared in 1954 circular. And never reappeared again. Not only is cancellation had on the ground that principles of natural justice were subverted it is also contrary to the instructions of the Governor-General and the President of India as given by them in 1950 and 1954 respectively. The Governor-General restricted the new pay scales to "existing employees".

(36) The President extended the frontiers to 1959. 31-12-1959 is the line of demarcation and division. The chapter was closed in 1959 in view of the new scales which were coming in 1960. This being the position there is no reason to differentiate between those "existing employees" who were in employment in 1950 and those who were taken in employment afterwards. In public employment every one must be treated alike. This was ultimately the decision of the President. An Adverse Presumption:

(37) Verma in his petition has quoted instances of persons who were

intermediates with certificates of physical education and who had been given to pay scale of Rs. 100 220 by the Directorate of Education. In Annexure Xxii to his petition he has quoted such seven instances. In the letter of the Director of Education dated 17-11-56 as many as 41 persons are named who were given pay scales in accordance with their qualifications irrespective of the date of their appointment. I required the Delhi Administration to produce the record of these persons to see whether they were all getting the pay scales of Rs. 100 220. In spite of repeated order these records have not been produced. They have withheld evidence under their control, u/s 114, Evidence Act, illust, (g) the normal presumption is that evidence which could be and is not produced would if produced, be unfavorable to the person who withholds it. (See AIR 1948 82 (Privy Council)). The department cannot pick and. choose. "One of the biggest problems is how to restrain the misuse or abuse of power", Lord Denning has said. This case affords a good illustration. Power has always a purpose for which it is exercised. Its abuse was well described by Rudyard Kipling in his verse. "He knows no use of power]Except to show his might". So the public authority must know the proper use of power. Tiwari's writ:

(38) So much for Verma. Now I take up the case of Tiwari. As I have said, at the time of employment he was a matriculate with a certificate of physical education. He was employed; in the pay scale of Rs. 68 170. It was raised in his case to Rs. 80 220. He improved his qualification in 1974. He became an intermediate in 1974. The question is whether he should be given the pay scale of Rs. 100 250 as is claimed by him in his writ petition. This is the only question now surviving for decision in his case.

(39) Before Tiwari acquired this new qualification of intermediate the old grades introduced by the Governor-General in 1950 were abolished. The new Revised Pay Order of 1960 came into force. According to this order of 1960 there are only two grades- grade I and grade II. Tiwari's case falls in grade II. According to that grade he is being paid Rs. 80 220. It is not possible for me to accept his contention that he is entitled to the grade of Rs. 100 250. That grade has now been abolished. I cannot give him that grade. The prevalent grades are two grades which were introduced by the Revised Pay Order of 1960. In this Revised Pay Order the acquisition of a qualification in 1976 is not a ground for raising the pay scale. So I must decline his request.

(40) Mr. Gupta has referred me to the Office Order No.159 dated 3-8-76 which was issued to O. P. Verma when his pay scale was revised in 1975. He says that the scale of Rs. 100 250 survived even in 1976 and it became the scale of Rs. 168 8-250-EB-8-280-10-300 from 1-7-1959 as is reflected in the said Office Order. I cannot accept this argument. After introduction of the two grades by the Revised Pay Order in 1960 it is not possible to look back in the past and introduce a new scale of Rs. 160 300 as counsel would have me hold. The dividing line, as I have said, is 31-12-1959. After this date there are only two grades. Tiwari's case falls in the second grade. Justice is blind

(41) The whole thrust of Verma's argument was that the cancellation order was passed at the instance of Tiwari. Out of spite and malice. That the governmental machinery moved on his complaint, it is true. But we, the judges, favor neither one side nor the other, and bear no ill will to one or the other. "Justice", said Joseph Addison, "discards party, friendship, kindred, and is Therefore always represented as blind".

(42) For these reasons I accept the writ of Verma (C.W.P. 162 of 1981) and quash-the cancellation order dated 27-1-1978 and issue a writ to the Delhi Administration that Verma must be paid the scale of Rs. 100 250 as revised from time to time. I restore the order dated 15-9-1975 passed in his favor. He will be entitled to all the benefits which accrued to him on the passing of the order dated 15-9-1975. The writ of Tiwari (C.W.P. 211 of 1977) is dismissed. The parties are left to bear their own costs.